

Case No. 07-30916

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORE L. MORRIS, also known as Pretty Boy,

Defendant-Appellant.

Appeal from the United States District Court  
for the Western District of Louisiana  
USDC Docket Nos. 5:07-CR-50003-1, 5:06-CR-50090-1

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REPLY BRIEF FOR APPELLANT

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REPLY TO ISSUE 1:

After correctly conceding that the 2-point enhancement to Core L. Morris' offense level under U.S.S.G. § 2B1.1(b)(10)(B)(i), (ii) was improper, the Government asserts that the error was not plain error because this Court could conclude, for the first time of appeal, that Morris' total offense level could be enhanced under U.S.S.G. § 2B1.1(b)(10)(C). Gov't br., ii, 2, 7-14, 17. While conceding that it could find no case in which this Court has applied an alternative enhancement, the Government seeks to have this Court do so in this matter. Gov't br., ii, 13. Morris respectfully submits that this Court must remand this matter for resentencing. See 18 U.S.C. § 3742(f)(1) ("If the court of appeals determines that" "the sentence was . . . imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate."); United States v. Bonilla, 524 F.3d 647, 655-56 (5th Cir. 2008), petition for cert. filed, (Oct. 3, 2008) (No. 08-6668); United States v. Tzep-Mejia, 461 F.3d 522, 526 (5th Cir.), rehearing and rehearing en banc denied, 213 F. App'x 366 (5th Cir. 2006).

Moreover, U.S.S.G. § 2B1.1(b)(10)(C)(i) does not apply to this matter. Section 2B1.1(b)(10)(C)(i) provides for a 2-point enhancement for "the unauthorized transfer or use of any means of identification unlawfully to produce

or obtain any other means of identification[.]” U.S.S.G. § 2B1.1, Application Note 9, establishes that “means of identification” “has the meaning given that term in 18 U.S.C. 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant.” U.S.S.G.

§ 2B1.1(b), Background, notes that

Subsection (b)(10)(C) implements the directive to the commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105-318. This subsection focuses principally on an aggravated form of identity theft known as “affirmative identity theft” or “breeding”, in which a defendant uses another individual’s name, social security number, or some other form of identification (the “means of identification”) to “breed” (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. 1028(d) broadly defines “means of identification”, the new or additional forms of identification can include items such as a driver’s license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were “bred” (i.e., produced or obtained) often are within the defendant’s exclusive control, making it difficult for the individual victim to detect that the victim’s identity has been “stolen.” Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual’s reputation or

credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Accord United States v. Melendrez, 389 F.3d 829, 832-33 (9th Cir. 2004)

(examining history of § 2B1.1(b)(10)(C), then found at U.S.S.G. § 2B1.1(b)(9)(C), which “implemented section 4 of the Identity Theft and Assumption Deterrence Act of 1998,” and noting that “the enhancement identifies two means of identification relevant here: the source ID numbers and the produced ID numbers, both of which must “be of an actual ( i.e., not fictitious) individual, other than the defendant.” (emphasis added)).

In its brief, the Government admits that Morris “use[d] his mother’s social security number (‘a means of identification’) in an attempt to obtain a driver’s license in his own name (‘other means of identification’).” Gov’t br., 12. Because Morris’ “other means of identification” was not of an actual individual other than the defendant, Morris is not subject to a 2-point § 2B1.1(b)(10)(C)(i) enhancement. See § 2B1.1(b)(10)(C)(i).

Accordingly, the Government’s effort to overcome Morris’ improper § 2B1.1(b)(10)(B)(i), (ii) enhancement fails. Morris is entitled to a 2-point reduction in his offense level, which would result in an offense level of 21 and a

guideline sentencing range of 70 to 87 months of imprisonment, as opposed to the sentence of 96 months of imprisonment imposed by the District Court. See PSI (which is in the yellow envelope), ¶¶ 26-30, 32-33, 35, 38-40, 42, 64, 86; R. 3, 2-3, 6.

Accordingly, Morris respectfully submits that this Court should (1) vacate his sentence; and (2) remand this matter to the District Court for further proceedings in light of this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DOUGLAS LEE HARVILLE, certify that today, October 23, 2008, two copies of the reply brief for appellant and an electronic copy of the reply brief were served upon AUSA Josette Louise Cassiere, opposing counsel, by hand-delivery to her office at United States Courthouse, 300 Fannin Street, Suite 3201, Shreveport, Louisiana 71101-3068.

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